IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 116 OF 2004
With
CIVIL APPLICATION NO. 9126 OF 2004
In
SECOND APPEAL NO. 116 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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JETUNBEN ALLARAKHA & ORS. - Appellant(s)
Versus
FAKIR KASAMSHA AHMEDSHA & ANR. - Respondent(s)

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Appearance :
SHRI PINAKIN M. RAVAL for Appellant(s).
SHRI M.A. SAPA with SHRI L.R. PATHAN for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 28/12/2006

COMMON ORAL JUDGMENT

1. The appeal is admitted for hearing the parties on the following substantial questions of law:

Whether on the facts and in the circumstances of the case, the learned first Appellate Court was justified in refusing the relief of possession, despite holding that the respondents are not the owners of the property or have no existing right as owners?

With the consent of the parties, the matter is finally heard.

2. The plaintiffs, namely, Fakir Allarakha Zahurali (since deceased through legal representatives), Fakir Muradali Zahurali and Fakir Bebima Zahurali filed a suit against the respondents - Fakir Kasamsha Ahmedsha and his wife Fakir Jetunben Kasamsha. In the suit, they had prayed that the defendants had no authority to stay on the property and were liable to be evicted.

2.1 The defendants appeared before the trial Court and submitted that the property in fact belonged to defendant No.2, Jetunben Kasamsha, who, because of financial stringency, could not pay the amount to the original owner and ultimately, the property came under the ownership of the appellants-plaintiffs. It was also submitted by them that defendant No.2 – Jetunben

Kasamsha, being the sister of plaintiff No.1, was allowed to remain on the property and under the circumstances, no order of eviction could be passed treating her to be a trespasser. The defendant No.1 – husband of defendant No.2 submitted that his wife having been allowed to stay on the property cannot be dispossessed because she is not the trespasser.

2.2 After recording the evidence and hearing the parties, the learned trial Court held that the plaintiffs were not entitled to any decree in their favour. As the appeal proved futile, the appellants-plaintiffs are before this Court.

3. Shri Pinakin M. Raval, learned Counsel for the appellants, submits that once it is held that the plaintiffs are the absolute owners of the property in dispute, then, under the circumstances, a decree for possession ought to have been passed. He submits that the two Courts below, despite holding the plaintiffs to be the owners of the property, erred in refusing the relief of possession.

4. On the other hand, Shri M.A. Sapa for Shri L.R. Pathan, learned Advocate for the respondents, submits

that in a given case, the person in possession may be a tenant, may be a licensee or may be on the land under some authority conferred upon him by the true owner and if such an authority is proved in his favour, then, such person cannot be evicted on the ground that he is a trespasser. His submission is that the Courts below were justified in refusing the relief for possession.

5. I have gone through the findings recorded by the two Courts. The two Courts, in the opinion of this Court, were not unjustified in holding that the plaintiffs are the owners of the property. Even otherwise it is not the case of the respondents – defendants that the plaintiffs are not the owners of the property. The only defence of the defendants is that they not being the trespassers cannot be evicted except in accordance with law.

6. After going through the entire material available on the record, I must hold that the plaintiffs are the owners of the property and they had allowed defendant No.2 to stay upon the property as defendant No.2 is the sister of deceased plaintiff No.1 and defendant No.1 is the brother in law of the deceased plaintiff No.1. I must hold that from the evidence

available on the record, it does not appear that the defendants are the tenants of the property. It is not even the case of the defendants that they are the tenants or some agreement of tenancy was entered into between the parties and/or the defendants were paying some rent to the plaintiffs. If the plaintiffs are not tenants upon the property nor trespassers, then, they would be taken to be any persons in permissive possession. I must add here that the defendants do not say that they had perfected their title by adverse possession. If the defendants are in permissive possession and cannot be treated to be the trespassers, then, decree cannot be granted in favour of the plaintiffs. The Courts below were justified in holding that the plaintiffs are the owners of the property, the defendants are not the owners of the property and the defendants are not the trespassers upon the land.

7. The appeal deserves to and is, accordingly, dismissed, but, however, it is made clear that the plaintiffs would be entitled to take up legal proceedings for dispossessing the defendants in accordance with law. In the said proceedings, the defendants would not be entitled to raise the question of ownership, adverse possession or creation of any tenancy in their favour

because this Court is holding that the defendants are in permissive possession. No costs. Let a decree be framed accordingly.

8. In view of the final disposal of the Second Appeal, Civil Application No.9126 of 2004 does not survive. It is, accordingly, disposed of.

[R.S.Garg, J.]

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